COURT OF APPEAL FOR ONTARIO

CITATION: Curriculum Services Canada/Services Des Programmes D'Études Canada (Re), 2020 ONCA 267
DATE: 20200427
DOCKET: C66626

Hoy A.C.J.O., van Rensburg and Roberts JJ.A.

IN THE MATTER OF THE BANKRUPTCY OF
Curriculum Services Canada/Services Des Programmes D'Études Canada
of the City of Toronto
in the Province of Ontario

Catherine Francis, for the appellant

Alex Ilchenko and Monty Dhaliwal, for the respondent

Heard: October 9, 2019

On appeal from the order of Justice Victoria R. Chiappetta of the Superior Court of Justice, dated February 15, 2019, with reasons reported at 2019 ONSC 1114.

van Rensburg J.A.:

I. OVERVIEW

[1] The appellant is Medallion Corporation, as authorized agent for the landlord, 280 Richmond Street West Limited (the "Landlord"). The respondent, RSM Canada Ltd. (the "Trustee"), is the trustee in bankruptcy of Curriculum Services Canada/Services des Programmes d'Études Canada ("Curriculum" or the "Tenant"). Curriculum was a tenant of the Landlord.

[2] This is the second appeal of the partial disallowance of the Landlord's claim in the bankruptcy of the Tenant. The first appeal, from the decision of the Trustee, was to Chiappetta J. of the Superior Court of Justice (the "bankruptcy judge").

[3] Broadly, this appeal is about the rights of a commercial landlord as a creditor in the bankruptcy of its tenant following the disclaimer of the lease by the trustee in bankruptcy. Specifically, the issue is whether a landlord has a claim arising from the disclaimer of its lease for any amount in relation to the unexpired term of the lease, other than its preferred claim for three months' accelerated rent under s. 136(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "BIA"). In other words, can a landlord claim as an unsecured creditor for the disclaimer of its lease, calculated in accordance with its contractual rights under the lease?[1]

[4] In Ontario, the law on this question was settled many years ago in *Re Mussens Ltd.*, [1933] O.W.N. 459 (H.C.).[2] As between the landlord and tenant, the disclaimer of a commercial lease by the tenant's trustee in bankruptcy brings to an end the future or ongoing obligations of the tenant under the lease. The landlord has no right of compensation or claim as an unsecured creditor for

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[1] Subsection 136(1)(f) also gives a landlord a preferred claim in respect of three months of arrears of rent preceding the bankruptcy. However, there is no issue in this case about arrears of rent or other amounts that were owing at the time of the bankruptcy, claims that the Landlord could have asserted as an unsecured creditor in Curriculum's bankruptcy. In these reasons, the analysis is limited to the issue of whether the landlord can claim as an unsecured creditor in the bankruptcy for damages relating to the unexpired term of the lease.

[2] The principle cited in *Re Mussens* was articulated in Canada at least as early as 1922 in *Eastern Nut Krust Bakeries, Ltd. v. Damphousse, Trustee and the Catherine Realties Ltd.* (1922), 2 C.B.R. 215 (Que. S.C.).

damages in respect of the unexpired term of the lease in relation to the loss of the tenancy as a result of the disclaimer; the landlord is limited to its preferred claim for up to three months' accelerated rent. The Landlord contends that this principle has been overtaken by more recent developments in the law.

[5] In this case, the Landlord claims the repayment of the value of certain tenant inducements ($203,442.37) according to a formula provided for in the lease. The Landlord asserts that it is entitled to claim this amount as an unsecured creditor in the bankruptcy of its former tenant, upon and notwithstanding the Trustee's disclaimer of the lease. The Landlord also claims the unpaid balance of its preferred claim for accelerated rent, pursuant to the lease, as an unsecured creditor under s. 136(3) of the BIA, which amounts to $50,289.28.

[6] For the reasons that follow, I would allow the appeal, but only to permit the Landlord to rank as an unsecured creditor for the unpaid balance of its preferred claim. Subsection 136(3) of the BIA expressly authorizes a landlord to claim the unrecovered balance of its preferred claim as an unsecured creditor in the bankruptcy of its tenant.

[7] As for the Landlord's claim to rank as an unsecured creditor to recover unpaid tenant inducements, the obligations under the lease between the Tenant and Landlord came to an end once the Trustee disclaimed the lease. As I will explain, the long-accepted rule articulated in *Re Mussens* has not been attenuated

by the decision of the Supreme Court in *Highway Properties Ltd. v. Kelly, Douglas & Co. Ltd.*, [1971] S.C.R. 562, nor has it been overruled by the Supreme Court's decision in *Crystalline Investments Ltd. v. Domgroup Ltd.,* 2004 SCC 3, [2004] 1 S.C.R. 60. The Landlord is not entitled to claim as an unsecured creditor in the bankrupt Tenant's estate for damages relating to the unexpired term of the lease, except to recover the balance of its preferred claim for three months' accelerated rent, which is specifically provided for by statute.

II. FACTS

[8] The Landlord and Tenant were parties to a lease dated May 26, 2017 (the "Lease"). The Lease was for 8,322 square feet of space at 150 John Street West, Toronto, for a term of ten years and six months, commencing on July 1, 2017 and ending on December 31, 2027.

[9] On March 29, 2018, and without being in default of its obligations under the Lease, Curriculum made an assignment in bankruptcy. RSM Canada Inc. was appointed trustee. The Trustee occupied the leased premises and paid occupation rent of $25,698.31 to the Landlord.

[10] On April 20, 2018, the Landlord filed a Proof of Claim in the bankruptcy. The Landlord claimed $100,558.59 as a preferred claim for three months' accelerated rent, in accordance with the priority of claims prescribed by s. 136(1)(f) of the BIA. Because the realization of property on the leased premises yielded an amount that

was less than the preferred claim ($24,571), the Landlord asserted its right to claim the balance of the unrecovered preferred claim ($75,987.59) as an unsecured creditor.

[11] The Landlord also advanced an unsecured claim in the amount of $4,028,111.23. This represented its claim for rent payable for the balance of the unexpired portion of the term of the Lease, together with amounts for tenant inducements consisting of leasehold improvements provided at the Landlord's cost under the Lease and free rent for a six-month period. In asserting its rights, the Landlord relied on the Tenant's obligation under the Lease to make certain payments on bankruptcy, including on termination or disclaimer of the Lease.

[12] Section 16.1 of the Lease provides for events of default, including the bankruptcy of the Tenant. It also provides for the Landlord's remedies, including: the payment of three months' accelerated rent; the right to terminate the Lease (with the right to obtain damages for the Landlord's deficiency for the balance of the term); and upon any termination, including disclaimer, payment of the value of the unpaid amount of any tenant inducements calculated over the unexpired term of the Lease. The relevant portions of s. 16.1 read as follows:

> 16.1. If any of the following shall occur:
>
> …
>
> (f) Tenant, any assignee or a subtenant of all or substantially all of the Premises makes an assignment for the benefit of creditors or becomes

bankrupt or insolvent or takes the benefit of any statute for bankrupt or insolvent debtors or makes any proposal, assignment, arrangement or compromise with its creditors or Tenant sells all or substantially all of its personal property at the Premises other than in the ordinary course of business (and other than in connection with a Transfer requiring Landlord's consent and approved in writing by Landlord), or steps are taken or action or proceedings commenced by any person for the dissolution, winding up or other termination of Tenant's existence or liquidation of its assets (collectively called a "Bankruptcy");

(g) a trustee, receiver, receiver-manager, manager, agent or other like person shall be appointed in respect of the assets or business of Tenant or any other occupant of the Premises;

…

then, without prejudice to and in addition to any other rights or remedies to which Landlord is entitled hereunder or at law, the then current and the next three (3) months' Rent shall be forthwith due and payable and Landlord shall have the following rights and remedies, all of which are cumulative and not alternative, namely:

…

(v) to obtain damages from Tenant including, without limitation, if this Lease is terminated by Landlord, all deficiencies between all amounts which would have been payable by Tenant for what would have been the balance of the Term, but for such termination, and all net amounts actually received by Landlord for such period of time;

…

> (vii) to obtain the Termination Payment from Tenant;[3]
>
> (viii) if this Lease is terminated due to the default of Tenant, or if it is disclaimed, repudiated or terminated in any insolvency proceedings related to Tenant (collectively "Termination"), to obtain payment from Tenant of the value of all tenant inducements which were received by Tenant pursuant to the terms of this Lease, the agreement to enter into this Lease or otherwise, including, without limitation, the amount equal to the value of any leasehold improvement allowance, tenant inducement payment, rent free periods, lease takeover, Leasehold Improvements or any other work for Tenant's benefit completed at Landlord's cost or any moving allowance, which value shall be multiplied by a fraction, the numerator of which shall be the number of months from the date of Termination to the date which would have been the natural expiry of this Lease but for such Termination, and the denominator of which shall be the total number of months of the Term as originally agreed upon.[4] [Emphasis added.]

[13] On April 23, 2018, the Trustee issued a Notice of Disclaimer of the Lease. Following the disclaimer, the Landlord found a new tenant for the leased premises, effectively mitigating its claim for future rent.

[14] On September 19, 2018, the Trustee issued a Notice of Partial Disallowance of Claim, allowing only the Landlord's preferred claim in the amount of $24,571

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[3] "Termination Payment" is defined in s. 2.30 of the Lease and provides a formula based on the amount by which the net present value of the amounts payable as "Rent" and "Additional Rent" under the Lease for the lesser of the balance of the Term or the next three years following the Termination Date exceeds fair market Rent. "Termination Date" is defined as the date on which the Lease is terminated, disclaimed or repudiated.

[4] Schedule C of the Lease provides a similar remedy to the Landlord on bankruptcy of the Tenant, but only in respect of the recovery of the unamortized portion of the leasehold improvement allowance.

(limited to the actual value of the property on the leased premises), and disallowing the Landlord's unsecured claims.

[15] The Landlord appealed the disallowance of its unsecured claim to the Superior Court of Justice. It confined its appeal to its claims under s. 16.1 of the Lease for tenant inducements in the amount of $203,442.37, including leasehold improvements and free rent, and the balance of the three months' accelerated rent of $50,289.28[5], for a total unsecured claim of $253,731.65.

III. RELEVANT STATUTORY PROVISIONS

[16] The relevant statutory provisions are found in the BIA and the *Commercial Tenancies Act*, R.S.O. 1990, c. L.7 (the "CTA").

[17] Section 71 of the BIA provides that a bankrupt's capacity to deal with its property ends on its bankruptcy, and that its property vests in the trustee in bankruptcy. The section reads:

> 71. On a bankruptcy order being made or an assignment being filed with an official receiver, a bankrupt ceases to have any capacity to dispose of or otherwise deal with their property, which shall, subject to this Act and to the rights of secured creditors, immediately pass to and vest in the trustee named in the bankruptcy order or assignment, and in any case of change of trustee the property shall pass from trustee to trustee without any assignment or transfer.

[5] The original claim of $100,558.59, less the recovered preferred claim in the amount of $24,571, less the occupational rent paid by the Trustee in the amount of $25,698.31.

[18] Subsection 30(1)(k) of the BIA provides that a trustee, with the approval of inspectors, may elect to retain for the whole or part of its unexpired term, or to assign, surrender, disclaim or resiliate, any lease of, or other temporary interest or right in, any property of the bankrupt.

[19] Section 136 of the BIA provides for the priority of certain unsecured claims, including, under s. 136(1)(f), priority for a landlord's claim for three months' arrears of rent and three months' accelerated rent. This claim ranks after: (a) a deceased bankrupt's funeral and testamentary expenses; (b) the costs of administration of the bankrupt's estate; (c) the Superintendent's levy; (d) certain claims for wages, alimony and support payments; and (e) municipal taxes. A landlord's preferred claim is limited to the value of the realization from the property located on the leased premises, and is to be credited against the amount payable by the trustee for occupation rent.

[20] Subsection 136(1)(f) specifically provides:

> 136. (1) Subject to the rights of secured creditors, the proceeds realized from the property of a bankrupt shall be applied in priority of payment as follows:
>
> …
>
> (f) the lessor for arrears of rent for a period of three months immediately preceding the bankruptcy and accelerated rent for a period not exceeding three months following the bankruptcy if entitled to accelerated rent under the lease, but the total amount so payable shall not exceed the realization from

> the property on the premises under lease, and any payment made on account of accelerated rent shall be credited against the amount payable by the trustee for occupation rent;

[21] Under s. 136(3) of the BIA, where the realization is less than the amount of the preferred claim, a landlord may claim the unrecovered balance as an unsecured creditor. Subsection 136(3) reads as follows: “A creditor whose rights are restricted by this section is entitled to rank as an unsecured creditor for any balance of claim due him”.

[22] While s. 136 of the BIA sets out a scheme of payment priorities, the landlord’s rights on a tenant’s bankruptcy are established under provincial law. Canada’s first bankruptcy legislation, the *Bankruptcy Act, 1919*, S.C. 1919, c. 36, prescribed, at s. 52, the remedies available to landlords on a tenant’s bankruptcy. After part of s. 52(5) was held to be *ultra vires* in *Re Stober* (1923), 4 C.B.R. 34 (Que. S.C.), the section was repealed and replaced with what is now s. 146 of the BIA, which provides:

> 146. Subject to priority of ranking as provided by section 136 and subject to subsection 73(4) and section 84.1 [these sections are not relevant to this appeal], the rights of lessors are to be determined according to the law of the province in which the leased premises are situated.

[23] The Ontario law that defines a commercial landlord’s rights on a tenant’s bankruptcy is found in the CTA. The landlord’s preferential lien for rent, and the trustee’s right to retain and to assign the lease, exercisable within three months of

the bankruptcy and before the trustee has disclaimed the lease, are set out in s. 38. Section 39 provides for the right of the trustee in bankruptcy, at any time before electing to retain the leased premises, to "surrender or disclaim" the lease. Sections 38 and 39 read as follows:

> 38. (1) In case of an assignment for the general benefit of creditors, or an order being made for the winding up of an incorporated company, or where a receiving order in bankruptcy or authorized assignment has been made by or against a tenant, the preferential lien of the landlord for rent is restricted to the arrears of rent due during the period of three months next preceding, and for three months following the execution of the assignment, and from thence so long as the assignee retains possession of the premises, but any payment to be made to the landlord in respect of accelerated rent shall be credited against the amount payable by the person who is assignee, liquidator or trustee for the period of the person's occupation.
>
> (2) Despite any provision, stipulation or agreement in any lease or agreement or the legal effect thereof, in case of an assignment for the general benefit of creditors, or an order being made for the winding up of an incorporated company, or where a receiving order in bankruptcy or authorized assignment has been made by or against a tenant, the person who is assignee, liquidator or trustee may at any time within three months thereafter for the purposes of the trust estate and before the person has given notice of intention to surrender possession or disclaim, by notice in writing elect to retain the leased premises for the whole or any portion of the unexpired term and any renewal thereof, upon the terms of the lease and subject to the payment of the rent as provided by the lease or agreement, and the person may, upon payment to the landlord of all arrears of rent, assign the lease with rights of renewal, if any, to any person who will covenant to observe and perform its terms and agree to

> conduct upon the demised premises a trade or business which is not reasonably of a more objectionable or hazardous nature than that which was thereon conducted by the debtor, and who on application of the assignee, liquidator or trustee, is approved by a judge of the Superior Court of Justice as a person fit and proper to be put in possession of the leased premises.
>
> 39. (1) The person who is assignee, liquidator or trustee has the further right, at any time before so electing, by notice in writing to the landlord, to surrender possession or disclaim any such lease, and the person's entry into possession of the leased premises and their occupation by the person, while required for the purposes of the trust estate, shall not be deemed to be evidence of an intention on the person's part to elect to retain possession under section 38. [Emphasis added.]

[24] These provisions have been in place relatively unchanged since 1924: see *Commercial Tenancies Act*, S.O. 1924, c. 42. As I will explain, they have been consistently interpreted to limit an Ontario landlord's rights once a lease has been disclaimed by a bankrupt tenant's trustee in respect of claims for damages relating to the unexpired term of the lease; a landlord's claim is limited to up to three months' accelerated rent (where the lease so provides).

[25] Before the bankruptcy judge and this court, the Landlord advanced a different interpretation of these provisions that would permit it to claim, as an unsecured creditor in the bankruptcy of its tenant, the specific amounts it bargained for under the Lease, which are payable on bankruptcy and specifically in the event of a disclaimer. I turn now to the reasons of the bankruptcy judge.

IV. THE REASONS OF THE BANKRUPTCY JUDGE

[26] The bankruptcy judge identified the issue as "whether it remains the law in Ontario that the disclaimer of a lease by a trustee in bankruptcy prevents a landlord from claiming unsecured damages". She dismissed the Landlord's appeal of the partial disallowance of its claim on the basis of a "long-established legal precedent".

[27] The bankruptcy judge referred to and followed the analysis of the Registrar in Bankruptcy in *Re Linens 'N Things Canada Corp.* (2009), 53 C.B.R. (5th) 232 (Ont. S.C.). In that case, the Registrar upheld a trustee's disallowance of amounts claimed under a lease, including the costs of building a structure expressly for the tenant, the tenant allowance, and the leasing commission. The Registrar relied on *Re Mussens* as authority that, after a disclaimer, there is no right in Ontario for a landlord to claim damages in respect of the unexpired portion of the lease. The bankruptcy judge noted that the Registrar in *Re Linens 'N Things* rejected the argument, based on *Highway Properties*, that the landlord could recover contractual damages as *Highway Properties* did not involve an insolvency. She endorsed para. 21 of *Re Linens 'N Things* where the Registrar stated that "the CTA and its predecessors has been found … to have the effect of a consensual ending of the lease, and … this is a statutorily permitted breach for which there is no damage remedy, beyond the s. 38 CTA and s. 136 BIA preferred claim".

[28] The bankruptcy judge also considered and rejected the Landlord's argument that *Crystalline Investments* had effectively overruled *Re Mussens*. After a close examination of each of these cases, as well as *Cummer-Yonge Investments Ltd. v. Fagot et al.* (1965), 50 D.L.R. (2d) 25 (Ont. H.C.), aff'd without reasons (1965), 50 D.L.R. (2d) 30n (Ont. C.A.) (a case that was overruled in *obiter* in *Crystalline Investments*), the bankruptcy judge concluded that *Crystalline Investments* had not addressed whether a landlord can claim unsecured damages in the bankruptcy proceedings of its tenant upon the disclaimer of a lease by the trustee, and that the principle in *Re Mussens* remained the law on this issue in Ontario, as correctly applied in *Re Linens 'N Things.*

[29] The bankruptcy judge dismissed the appeal of the partial disallowance of the Landlord's claim, without addressing the balance of the Landlord's claim for three months' accelerated rent.

V. ISSUES ON APPEAL

[30] Two issues are raised in this appeal:

1. Is the Landlord entitled to assert a claim for unpaid tenant inducements under the Lease as an unsecured creditor in Curriculum's bankruptcy?
2. Is the Landlord entitled to assert the balance of its preferred claim for three months' accelerated rent as an unsecured creditor in Curriculum's bankruptcy?

[31] The bulk of these reasons will address the first question, which involves the Landlord's challenge to the ongoing authority of *Re Mussens* and the Landlord's

interpretation of the relevant provisions of the BIA and CTA. With respect to the second issue, I will briefly explain that, on a plain reading of s. 38 of the CTA, together with s. 136(3) of the BIA, the Landlord is entitled to claim as an unsecured creditor for the balance of its preferred claim for three months' accelerated rent.

VI. ANALYSIS

(1) Is the landlord entitled to assert a claim for unpaid tenant inducements under the lease as an unsecured creditor in Curriculum's bankruptcy?

[32] The Landlord contends that it should be able to claim in Curriculum's bankruptcy for unpaid tenant inducements under the Lease in the same way that other unsecured creditors can assert claims for contractual damages. It argues that the principle in *Re Mussens* was overruled by the Supreme Court's decision in *Crystalline Investments*. Further, the Landlord suggests that, while other provinces have specifically prohibited landlords from claiming damages for the unexpired portion of a lease, the CTA contains no such restriction and does not prohibit such a claim. In effect, the Landlord proposes an interpretation of ss. 38 and 39 of the CTA that, upon disclaimer, would give priority to its claim for up to three months' accelerated rent, while permitting it to claim damages in respect of the unexpired term of the Lease in accordance with the terms of the Lease.

[33] The Landlord relies on the principle stated in *Highway Properties*, that a lease both creates an interest in land and gives rise to contractual rights, and its

recognition of a landlord's right to accept a tenant's termination of a lease and to sue for damages for its breach. The Landlord argues that there is nothing in the BIA or the CTA to prevent a landlord from filing an unsecured claim for damages in the estate of a bankrupt tenant, nor is there any principled reason why a landlord should be treated differently from other creditors in a bankruptcy. The Landlord points to the terms of the Lease that expressly contemplate and provide for the situation of a bankruptcy or disclaimer and set out the contractual damages to which the Landlord is entitled.

[34] In the discussion that follows, I begin with a brief summary of *Re Mussens* and the way that this authority has been interpreted by the courts. I will specifically address a line of cases dealing with the obligations of guarantors, assignors, and others following the disclaimer of a commercial lease, including the leading case from Ontario, *Cummer-Yonge Investments.*

[35] Turning to *Crystalline Investments*, I will explain that, while overturning the principle in *Cummer-Yonge Investments* that a trustee's disclaimer can release a guarantor from its obligations under the lease, *Crystalline Investments* did not address, and left intact, the rule articulated in *Re Mussens* and later cases, that on disclaimer of a commercial lease by its trustee, an Ontario landlord has no claim against a bankrupt tenant arising out of the disclaimer for damages in respect of the unexpired term of the lease; the landlord has only what is specifically provided for – its preferred claim for three months' accelerated rent.

[36] I will then turn to the Landlord's argument based on *Highway Properties.* As I will explain, the argument that *Highway Properties* alters the principle stated in *Re Mussens*, and affords additional remedies to a landlord post-disclaimer, has been rejected in other cases, and for good reason. *Highway Properties* recognized that a lease is also a contract, and provided for a landlord's "fourth option" after a tenant's repudiation, that of accepting the repudiation, and suing for prospective damages. The case, however, did not address a situation of bankruptcy or insolvency. The remedies for a tenant's repudiation do not apply once a trustee has disclaimed the lease. The Landlord's argument fails to recognize the fundamental distinction between a disclaimer and a repudiation of a lease.

[37] Finally, on this issue, I will briefly consider the Landlord's argument that the relevant statutory provisions should be interpreted harmoniously with those that apply to a reorganization under the *Companies' Creditors Arrangements Act*, R.S.C. 1985, c. C-36 (the "CCAA"). While the CCAA contains provisions that permit the disclaimer of any agreement to which the company is a party, including leases, and specifically provides for a provable claim by a party suffering a loss in relation to the disclaimer, there is no comparable provision that applies to leases disclaimed by a trustee on bankruptcy.

(a) The principle stated in *Re Mussens*

[38] *Re Mussens* involved a landlord's claim for damages under the *Winding-Up Act*, R.S.C. 1927, c. 213, for breach of its tenant's covenant to pay future rent after

the liquidator had disclaimed the lease. Rose C.J. rejected the landlord's claim, concluding, at pp. 460-61, that if the liquidator exercised its right under the *Landlord and Tenant Act*, R.S.O. 1927, c. 190 to "surrender possession or disclaim" the lease, then there could be no further liability of the tenant to pay rent "and no suggestion that, by failing to pay rent, the tenant was committing a breach of covenant and was rendering himself liable for liquidated or unliquidated damages". Rose C.J. stated, at pp. 460-61:

> I think that by his letter of April 21, 1932, confirmed in his letter of June 21, 1932, the liquidator exercised his right "to surrender possession or disclaim" the lease, and that when he had exercised that right the obligation of the tenant, the insolvent company, to pay rent was at an end. It did not require a statute to confer upon the liquidator power to surrender possession or disclaim the lease with the consent of the lessor; the statute means I think that whether the lessor is or is not willing the liquidator may surrender possession or disclaim the lease, and that if he does so surrender possession or disclaim the lease the tenant in liquidation shall be in the same position as if the lease had been surrendered with the consent of the lessor. Of course, if the lease were surrendered with the consent of the lessor, there could be no suggestion of any further liability on the part of the lessee to pay rent and no suggestion that, by failing to pay rent, the tenant was committing a breach of covenant and was rendering himself liable for liquidated or unliquidated damages. [Emphasis added.]

[39] In this passage, Rose C.J. concluded that the statutory right to "surrender possession or disclaim" a lease has the same effect as a surrender with the consent of the lessor. As I will explain, this statement, equating a disclaimer with

a consensual surrender of a lease, was applied in subsequent cases, such as *Cummer-Yonge Investments*, to release derivative obligations such as those of a guarantor, after a lease had been disclaimed by a tenant's trustee.

[40] More important to the present analysis, however, is the court's interpretation in *Re Mussens* of the relevant statutory provisions, and whether they permit a landlord to make a claim for damages for the surrender or disclaimer of the lease in the tenant's bankruptcy proceedings. Contrasting the provisions of the *Landlord and Tenant Act* with the comparable legislation in England that provided specifically for a right to compensation following a disclaimer, at p. 461, Rose C.J. concluded that, in Ontario, there was no "similar saving of the rights of the lessor" and therefore no equivalent right to compensation. In other words, the silence in the Ontario legislation on the question of compensation meant that, after a disclaimer, the landlord had no claim for damages against the tenant in relation to the ending of the lease, and was limited to what it was specifically afforded by statute. Rose C.J. stated, at p. 461:

> In England, as is pointed out by the Master in his judgment, the statute with which sec. 38 of *The Landlord and Tenant Act* more or less corresponds, contains the provision that any person injured by the operation of the section (i.e., by the disclaimer or surrender) shall be deemed a creditor of the bankrupt to the extent of such injury and may accordingly prove the same as a debt under the bankruptcy; but the Ontario statute contains no similar saving of the rights of the lessor, and I think that the result is that in Ontario the liquidator has been given a statutory right to commit a breach of the insolvent's

> covenant, and that no right of compensation for the statutory breach having been given to the covenantee no damages can be recovered. [Emphasis added.]

[41] *Re Mussens* accordingly stands for the principle that, under Ontario law, the trustee of a bankrupt tenant is permitted by statute to bring an end to the lease, and all future obligations of the tenant thereunder, by surrendering possession of the leased premises or disclaiming the lease within three months of the bankruptcy. The principle articulated in *Re Mussens*, and the case itself, have been referred to in subsequent cases (some of which are referred to later in these reasons) and in articles and texts dealing with bankruptcy and insolvency and commercial leases. See e.g. L.W. Houlden, "Bankruptcy of the Landlord or Tenant" (1965), 7 C.B.R. (N.S.) 113, at p. 123; Christopher Bentley et al., *Williams & Rhodes' Canadian Law of Landlord and Tenant,* 6th ed. (Toronto: Thomson Reuters Canada Limited, 2019), at c. 12:6:3 (WL); Steven Jeffery, "*Cummer-Yonge* - A Post-Mortem: *Crystalline Investments Ltd. v. Domgroup Ltd*." (2006), 21 B.F.L.R. 263, at p. 285; and David Bish, *Canadian Bankruptcy and Insolvency Law for Commercial Tenancies*, (Toronto: LexisNexis Canada Inc., 2016), at pp. 225, 394.

[42] The Landlord notes that four provinces have legislation that expressly prohibits the type of claim it advances here (Prince Edward Island, Saskatchewan, Alberta and British Columbia), while nine provinces and territories have no such prohibition. However, it does not follow, as the Landlord argues, that such a claim

is permitted where it is not expressly prohibited or restricted. Indeed, the Landlord has not cited a single case that would interpret the legislation this way, nor any case that is contrary to the interpretation provided for in *Re Mussens*. As discussed, *Re Mussens* interpreted the absence of a landlord's statutory right of compensation for termination of the lease after a disclaimer (other than the claim for up to three months' accelerated rent) as meaning that there is no such right.

(b) *Crystalline Investments* changed the law in Ontario, but not in the way the Landlord contends

[43] The Landlord argues that recent cases, including *Crystalline Investments*, specifically overruled the *Re Mussens* line of cases, such that a disclaimer does not bring an end to all obligations under the lease. As a result, the Landlord argues that the obligation to pay the tenant inducements, which was specifically contemplated by the Lease as an obligation upon any termination of the Lease, bankruptcy of Curriculum, or disclaimer by its trustee, must survive.

(i) The *Cummer-Yonge Investments* line of cases

[44] *Re Mussens* was applied in a number of cases as authority that, upon disclaimer by a trustee, all obligations in connection with a lease come to an end, not just those of the tenant. In particular, courts have relied on the statement in *Re Mussens* equating a disclaimer with a mutual surrender of a lease to conclude that the obligations of assignors and guarantors also come to an end with the disclaimer of a lease.

[45] The leading case in Ontario articulating this conclusion was *Cummer-Yonge Investments.* In that case, a bankrupt tenant's lease was disclaimed by a trustee in bankruptcy, leaving the landlord with a claim beyond its preferred claim in the bankruptcy. The landlord turned to a third-party guarantee securing "the due performance by the lessee of all of its covenants … including the covenant to pay rent". The landlord accepted that the tenant's further obligations under the lease had ended, but asserted that, upon disclaimer, the rights and obligations under the lease were revested in the bankrupt tenant, and so would permit a claim on a guarantee.

[46] Gale C.J. rejected this argument, citing the passage from *Re Mussens* equating a disclaimer to a surrender. He concluded that on bankruptcy, all of the tenants' rights and obligations under the lease irrevocably pass to the trustee and "when the trustee subsequently disclaimed that interest, all the rights and obligations which he inherited from the bankrupt were wholly at an end": at p. 29. For this reason, the guarantee was inoperative. Thereafter there could be no covenants in the lease which the lessee was required to perform, so that the guarantee of the "due performance by the lessee of all its covenants in the lease" was thereupon extinguished.

[47] This approach was followed in a number of cases that cited and relied on the statement in *Re Mussens* equating the statutory surrender of possession or disclaimer by a trustee to a surrender with the consent of the landlord. For

example, in *Re Salok Hotel Co. Ltd.* (1967), 66 D.L.R. (2d) 5 (Man. Q.B.), aff'd on other grounds (1967), 66 D.L.R. (2d) 5 (Man. C.A.), at p. 14, Wilson J. cited *Re Mussens* as authority that, upon the disclaimer of a lease by the trustee, all liability of the trustee and of the estate of the bankrupt lessee up to that time was extinguished, and that the landlord could not rank against the estate of the bankrupt for breach of contract. Citing *Cummer-Yonge Investments*, Wilson J. also held that, upon disclaimer of the lease, the liability of guarantors is also at an end.

[48] The decision in *Cummer-Yonge Investments* was controversial. It was cited and followed in a number of cases, including *Titan Warehouse Club Inc. (Trustee of) v. Glenview Corp.* (1988), 67 C.B.R. (N.S.) 204 (Ont. H.C.), aff'd 75 C.B.R. (N.S.) 206 (Ont. C.A.) and *Peat Marwick Thorne Inc. v. Natco Trading Corporation* (1995), 22 O.R. (3d) 727 (Gen. Div.). It was distinguished in *885676 Ontario Ltd. (Trustee of) v. Frasmet Holdings Ltd.* (1993), 99 D.L.R. (4th) 1 (Ont. Gen. Div.). (Each of these cases involved claims under letters of credit.) Moreover, in *Andy & Phil Investments Ltd. v. Craig* (1991), 5 O.R. (3d) 656 (Gen. Div.) and *Sifton Properties Limited v. Dodson* (1994), 28 C.B.R. (3d) 151 (Ont. Gen. Div.), the courts accepted that a guarantee could be drafted to secure an obligation that would survive bankruptcy.

[49] In 1993, the British Columbia Court of Appeal, without citing *Cummer-Yonge Investments*, concluded that the disclaimer of two assigned leases by an assignee's trustee in bankruptcy did not end the assignors' obligations to their

landlords: *Transco Mills Ltd. v. Percan Enterprises Ltd.* (1993), 100 D.L.R. (4th) 359 (B.C.C.A.). In that case, the assignor tenants made the argument accepted in *Cummer-Yonge Investments* – that a disclaimer had the same effect as a mutual surrender of a lease, with the result that the obligations of any third party, such as an assignor, would be eliminated. The relevant B.C. legislation was comparable to ss. 38 and 39 of the CTA.

[50] Writing for the court in *Transco Mills*, Taylor J.A., at pp. 364-65, traced the assertion that a disclaimer can be equated to a mutual surrender to s. 23 of the *Bankruptcy Act 1869* (U.K.), 32 & 33 Vict., c. 71, which had specifically provided that a lease disclaimed by a trustee shall be deemed to have been surrendered.[6] He noted (as did Rose C.J. in *Re Mussens*), that the U.K. statute specifically gave to any person injured by the operation of the section a right to claim in the bankruptcy for such injury. He then referred to later English case law restricting the meaning of surrender in this statutory context, including *Hill v. East & West India Dock Co.* (1884), 9 App. Cas. 448 (H.L.), where Lord Blackburn, at p. 458, stated that the statutory concept of deemed surrender was to be taken to apply only "so far as is necessary to effectuate the purposes of the Act and no further".

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[6] The reference to "deemed surrender" was subsequently omitted from the U.K. *Bankruptcy* Act: see *Transco Mills*, at p. 365.

[51] Taylor J.A. observed that, by contrast to the U.K. legislation, there was no statutory or other basis in B.C. for equating the disclaimer of a lease by a trustee to a surrender. He approved of the way the English courts had approached the U.K. legislation: the effect of a disclaimer should be limited to accomplishing the purpose of the bankruptcy scheme only, and, so far as possible, to not adversely affect the position of those outside the bankruptcy. As a result, he held, at p. 369, that the trustee's disclaimer did not end the leases for all purposes and that the assignor tenants remained liable for the bankrupt assignee's failure to pay rent.

[52] The issue in the cases discussed above was not whether the bankrupt tenant was relieved of its ongoing obligations under a disclaimed lease (this was either stated directly or assumed), but whether the disclaimer also ended the landlord's rights against security provided by the tenant, a guarantor of the tenant's obligations, or an assignor of a lease that was subsequently disclaimed.

[53] Ultimately, the approach in *Transco Mills* was followed by this court in *Crystalline Investments*, which sought to distinguish *Cummer-Yonge Investments.* This court's decision in *Crystalline Investments* was ultimately upheld by the Supreme Court which, in *obiter*, overruled the *Cummer-Yonge Investments* holding. I turn to *Crystalline Investments* now.

(ii) The Supreme Court decision in *Crystalline Investments*

[54] In *Crystalline Investments*, a commercial tenant ("Domgroup"), entered into leases with each of Crystalline Investments Limited and Burnac Leaseholds Limited (the "landlords"). Domgroup subsequently assigned the two leases to its subsidiary which was thereafter sold and amalgamated to form Food Group Inc. ("Food Group"). Food Group ultimately became insolvent and filed a proposal under s. 65.2 of the pre-1997 version of the BIA. The terms of the proposal purported to "repudiate" the assigned leases (s. 65.2 was later amended to use the term "disclaim").[7] The landlords had a right to challenge the repudiation, but did not do so, and were then limited to a claim for the lesser of up to six months' rent and the rent for the remainder of the leases following repudiation. The landlords sued Domgroup for their additional damages, relying on the provision in the leases confirming that the assignor would remain fully liable thereunder notwithstanding any assignment.

[55] Domgroup argued successfully at first instance that its position was comparable to that of the guarantor in *Cummer-Yonge Investments*: the effect of the repudiation of the leases in the bankruptcy proposal was that all obligations

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[7] At the time s. 65.2 of the BIA used the word "repudiate" rather than disclaim and limited the landlord's compensation to payment of an amount equal to the rent payable over the six-month period immediately following repudiation or the remainder of the term of the lease if less than six months. The section was amended in 1997 to substitute the word "disclaim" for "repudiate". It was also amended to prescribe a different landlord remedy.

under the leases had come to an end for all purposes, thereby terminating its obligations as assignor. Domgroup was successful in having the action dismissed in its summary judgment motion: (2001), 39 R.P.R. (3d) 49 (Ont. S.C.). The landlords prevailed in their appeal to this court: (2002), 49 R.P.R. (3d) 171 (Ont. C.A.). Carthy J.A., writing for this court, referred to and approved of the reasoning of the British Columbia Court of Appeal in *Transco Mills.* He also purported to distinguish *Cummer-Yonge Investments*, on the basis of the difference between a guarantor of obligations under a lease and one who has primary obligations. In this case, the assignor had signed “as principal and not as surety”.

[56] The Supreme Court upheld the decision of this court. However, rather than attempting to distinguish the *Cummer-Yonge Investments* line of cases, Major J., writing for the court, examined the issue based on first principles. He concluded that, absent a contractual release from the landlord, the original tenant as assignor under the lease would remain liable on the covenant to the landlord, notwithstanding the insolvency of the assignee and any consequent repudiation of the lease.

[57] The issue in *Crystalline Investments* was fairly narrow: did s. 65.2 of the BIA alone terminate the rights and obligations of the assignor under the leases?[8] At the time, s. 65.2 read as follows:

> 65.2 (1) At any time between the filing of a notice of intention and the filing of a proposal, or on the filing of a proposal, in respect of an insolvent person who is a commercial tenant under a lease of real property, the insolvent person may repudiate the lease on giving thirty days notice to the landlord in the prescribed manner, subject to subsection (2).

[58] Major J. observed that, while s. 65.2 focusses on bilateral relationships, such as a simple lease between a landlord and a tenant, the effect of the repudiation does not change in a tripartite arrangement resulting from the assignment of a lease: "In both situations the repudiation must be construed as benefiting only the insolvent": at para. 27. At para. 28, he observed that "[t]he plain purposes of the section are to free an insolvent from the obligations under a commercial lease that have become too onerous, to compensate the landlord for the early determination of the lease, and to allow the insolvent to resume viable operations as best it can", and that "[n]othing in s. 65.2, or any part of the Act, protects third parties (i.e. guarantors, assignors or others) from the consequences of an insolvent's repudiation of a commercial lease". Major J. confirmed that such third parties would

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[8] Major J. concluded that, whether the leases were terminated by surrender, which was raised for the first time by Domgroup in the Supreme Court, or by the application of some other principle of common law, was a question best left for trial: at para. 10.

remain liable when the party on whose behalf they acted becomes insolvent. He explained that, on an assignment of a lease, while the landlord's privity of estate with the original tenant comes to an end, the privity of contract continues and the original tenant remains liable upon its covenant: at para. 29.[9]

[59] The Supreme Court addressed the argument that, unless a repudiation under s. 65.2 terminated a lease for all purposes, an assignor's common law indemnification right against the original tenant could frustrate the BIA: the insolvent assignee could face an additional claim on the lease in excess of the preferred payment required to be paid to the landlord under s. 65.2. Major J. rejected this argument, noting that in such circumstances, the assignor would simply join the other unsecured creditors in the proceedings: at paras. 32-35.

[60] Finally, Major J. confirmed that the same analysis should apply to the *Cummer-Yonge Investments* facts: "Post-disclaimer, assignors and guarantors

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[9] While accepting that upon assignment, the landlord's privity of estate with the original tenant/assignor comes to an end, Major J. did not address the question of what became of the leasehold interest as between the assignor and the landlord, once the assignor was called upon under the assignment. In *Transco Mills*, Taylor J.A. concluded that the disclaimer would result in the automatic revesting of the balance of the term in the assignor, preserving the leasehold interest, which could be recognized by a vesting order: at p. 369. This is similar to what is provided for expressly in the comparable U.K. legislation, as interpreted by cases such as *Hindcastle Ltd. v. Barbara Attenborough Associates Ltd. et al.*, [1996] 1 All. E.R. 737 (H.L.). Indeed, in *Hindcastle Ltd.*, the House of Lords decision referred to by Major J. at para. 41 of *Crystalline Investments*, Lord Nicholls concluded, at p. 748, that a disclaimer operates to determine the bankrupt tenant's interest in the leased property, and that it has the effect of accelerating the reversion expectant upon the determination of that estate, such that as between the landlord and tenant the lease ceases to exist. At the same time, the rights of others, such as guarantors and original tenants/assignors are to remain as though the lease had continued and had not been determined.

ought to be treated the same with respect to liability. The disclaimer alone should not relieve either from their contractual obligations": at para. 42.

[61] Major J. observed that *Cummer-Yonge Investments* had created uncertainty in leasing and bankruptcy, as drafters of leases attempted to circumvent its holding by playing upon the primary and secondary obligation distinction, and courts performed "tortuous distinctions" in order to reimpose liability on guarantors: at para. 39. Major J. noted, at para. 41, that, in *Cummer-Yonge Investments*, Gale C.J. applied the reasoning of the English Court of Appeal in *Stacey v. Hill*, [1901] 1 K.B. 660 (C.A.), which was subsequently overruled by the House of Lords in *Hindcastle Ltd. v. Barbara Attenborough Associates Ltd. et al.*, [1996] 1 All. E.R. 737 (H.L.). He concluded that *Cummer-Yonge Investments* "should meet the same fate": at para. 42.

(iii) *Crystalline Investments* did not affect the principle stated in *Re Mussens*

[62] In the present case, the bankruptcy judge concluded, after her own review of *Crystalline Investments*, that neither the *ratio decidendi* nor the *obiter dicta* of that case (overturning *Cummer-Yonge Investments*) addressed whether a landlord can claim unsecured damages in the bankruptcy proceedings of its tenant upon the disclaimer of a lease by the trustee in bankruptcy. I agree with her analysis and conclusion.

[63] In *Re Mussens* the court equated the legal effect of a trustee's statutory right of disclaimer to a "mutual surrender" of the lease. Subsequent decisions, invoking that characterization, have reasoned that certain third-party obligations that are linked to the lease come to an end when the lease is disclaimed by the trustee. This has led to confusion and ultimately to cases, like *Cummer-Yonge Investments*, that were overtaken by *Crystalline Investments*.

[64] As noted earlier, although *Re Mussens* used the language of "mutual surrender", Taylor J.A. appears to reject that characterization in *Transco Mills*. In *Crystalline Investments*, the Supreme Court did not address the issue. Whether or not a disclaimer should be characterized as a mutual surrender, both *Re Mussens* and *Transco Mills* are consistent in their treatment of the legal effect of a disclaimer on the obligations of a bankrupt tenant.

[65] The key underlying principle that emerges from *Crystalline Investments* is that the disclaimer of a lease by the tenant's trustee benefits only the insolvent party.[10] The Supreme Court overruled *Cummer-Yonge Investments*, stating that the liability of assignors and guarantors would not be discharged by the disclaimer alone. Major J. did not contradict the premise that a trustee's disclaimer ends the obligations of the tenant under the lease. Indeed, he assumed that the effect of a

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[10] I note that although U.K. insolvency legislation is different, the House of Lords has treated a disclaimer in the same fashion; a disclaimer puts an end to the bankrupt's obligations under the lease, but determination of the lease is not permitted to affect the rights or liabilities of other persons: see *Hindcastle Ltd.*, at p. 748; *Re Park Air Services Plc*, [1999] 1 All. E.R. (H.L.), at pp. 678-79, *per* Lord Millett.

disclaimer is to bring the tenant's obligations under the lease to an end, and he explained that the purpose of s. 65.2 of the BIA is "to free an insolvent from the obligations under a commercial lease that have become too onerous, to compensate the landlord for the early determination of the lease, and to allow the insolvent to resume viable operations as best it can": at para. 28. *Crystalline Investments* is consistent with the principle stated in *Re Mussens* that a disclaimer operates to end the bankrupt tenant's obligations under the lease. However, it would not support an interpretation of *Re Mussens* that would characterize a disclaimer as a consensual surrender for all purposes.

[66] The parties to the present appeal requested and were granted leave to make written submissions on *7636156 Canada Inc. v. OMERS Realty Corporation*, 2019 ONSC 6106, 74 C.B.R. (6th) 312, a decision released shortly after the hearing of the appeal. In that case, Hainey J. relied on *Re Mussens* and distinguished *Crystalline Investments* in the context of a landlord's rights under a letter of credit following disclaimer by the tenant's trustee in bankruptcy. After citing the *Cummer-Yonge Investments* line of cases referred to in para. 48 above he concluded that on disclaimer, "the bankrupt no longer has any obligations owing to the landlord under the lease, and the landlord is not entitled to draw on a letter of credit provided as security under the lease for any amounts in excess of the Landlord's three months' accelerated rent preferred claim under s. 136(1)(f) of the BIA": at para. 39. He accepted the trustee's submission that his conclusion was not impacted by

Crystalline Investments because the obligation to make payment under the letter of credit was "wholly dependent on the continued existence of the Bankrupt's obligations to the Landlord under the Lease": at para. 44.

[67] *736156* has since been appealed to this court: C67634. Because the case was concerned with the obligations under a letter of credit after disclaimer, and not any claim by the landlord in the tenant's bankruptcy, and in view of the outstanding appeal, it is unnecessary and beyond the scope of these reasons to address the decision, except to note that the court accepted the continuing authority of *Re Mussens*.

(c) *Highway Properties* does not provide a basis for the Landlord's claim for tenant inducements under the Lease

[68] I turn now to address the Landlord's argument that *Highway Properties* would support its right to claim as an unsecured creditor for the tenant inducements provided for under the Lease. The same argument has been rejected in other cases, for good reason, and must be rejected here. In short, while *Highway Properties* recognized that, after accepting a tenant's repudiation, the landlord can assert a contractual claim for its prospective losses, the case does not speak to a landlord's remedies in bankruptcy or insolvency. In particular, it does not address the remedies that are available to a landlord after a lease has been disclaimed by the tenant's trustee in bankruptcy.

(i) The Supreme Court decision in *Highway Properties*

[69] *Highway Properties* involved the claim of a landlord for prospective losses following a tenant's repudiation of an unexpired lease. The tenant had abandoned the premises and the landlord took possession, while asserting a claim for damages for its loss calculated over the unexpired term of the lease. The lower courts had dismissed the landlord's claim for prospective damages, concluding that the repudiation of the lease by the tenant and the taking of possession by the landlord amounted to a surrender by operation of law, so that the lease ceased to exist. Accordingly, claims for prospective loss could not be supported and only accrued loss could be claimed.

[70] At the time the case was heard, the law recognized three mutually exclusive options available to a landlord on a tenant's repudiation of a lease: (i) to do nothing and insist on the tenant's performance of the terms and sue for rent or damages on the footing the lease remains in force; (ii) to elect to terminate the lease, retaining the right to sue for rent accrued due or for damages to the date of termination for prior breaches of covenant; or (iii) to advise the tenant of the landlord's intention to re-let the property on the tenant's account and to enter into possession on that basis: see *Highway Properties*, at p. 570.

[71] In *Highway Properties*, Laskin J., writing for the court, observed that a lease is both a conveyance and a contract. The termination of the tenant's estate in the land when its repudiation was accepted by the landlord did not necessarily mean

that the tenant's covenants under the lease came to an end. Laskin J. accepted the proposition that the landlord had a fourth contractual option on repudiation of the lease, which was exercised in that case: to terminate the lease with notice to the tenant that damages will be claimed for the loss of the benefit of the lease over its unexpired term, while repossessing the leased property.

[72] *Highway Properties* specifically addressed remedies available to a landlord after a tenant's repudiation of the lease. It did not, however, change the legal effect of a disclaimer or alter the principle in *Re Mussens.* To treat a disclaimer as a repudiation for damages purposes is to ignore the fundamental distinctions between surrender and disclaimer on the one hand and repudiation on the other.

(ii) Cases considering the Landlord's *Highway Properties* argument

[73] The attempt to rely on *Highway Properties* to support a landlord's claim for prospective damages in a bankruptcy after disclaimer has been rejected in a number of cases.

[74] In *Re Vrablik* (1993), 17 C.B.R. (3d) 152 (Ont. Gen. Div.), the issue was whether, post-disclaimer, a landlord could claim as an unsecured creditor in its tenant's bankruptcy for damages in lieu of payments that would have been due under the unexpired portion of a five-year commercial lease. These included rent before the premises were re-let, taxes, maintenance costs, and the shortfall on re-letting the premises. Maloney J. observed that it would be a "grave error" to

adopt the analysis and decision in *Highway Properties* as "the present case involves a bankruptcy, which is quite different from an outright repudiation of a contract. A bankruptcy is a final and irreversible situation": at p. 158. He rejected the argument that the reference to the landlord's rights being determined by the "laws of the province in which the leased premises are situated" in s. 146 of the BIA, referred to the common law of the province, including the option to accept the termination and to sue for prospective damages, as recognized in *Highway Properties.* Rather, this phrase referred to ss. 38 and 39 of the *Landlord and Tenant Act*, R.S.O. 1990, c. L.7, which together with the BIA would limit the landlord's claim to three months' rent. Maloney J. concluded that the BIA and the *Landlord and Tenant Act* provided a comprehensive scheme for the administration of the leasehold interests of bankrupt tenants and that *Highway Properties* had no application: at pp. 158-59.

[75] Similarly, as I have noted in para. 27 above, in *Re Linens 'N Things*, the Registrar dismissed an appeal of a trustee's disallowance of a landlord's claim for the costs of building a structure, amounts provided under the lease as a tenant's allowance, and the commission paid on the lease itself by the landlord, following the disclaimer of the lease by the trustee. The landlord, relying on *Highway Properties*, had characterized these claims as damages for breach of contract rather than rent. The Registrar rejected this argument, noting that in *Highway Properties* the tenant had repudiated the lease, and there was no insolvency or

any question of the applicability of s. 146 of the BIA or anything like ss. 38 and 39 of the CTA. As such, the terms of the lease, which reserved to the appellant “all of its rights at law and equity for breach of the lease” were irrelevant: at paras. 15-16.

[76] The Registrar observed, at paras. 20-21:

> The Ontario statute did not provide for such a damage claim and deemed creditor status 76 years ago, and it does not do so today. The Dominion Parliament, in exercising its jurisdiction over bankruptcy law in the Dominion, has wholly left it up to the Provinces to determine the rights of lessors in these circumstances, and the Provincial Parliament has not seen fit to provide for the type of damage claim advanced by the Appellant
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> …
>
> [N]either of the statutes which govern rights in these matters provides for the type of claim advanced. Even more, the CTA and its predecessors, has been found for the better part of a century to have the effect of a consensual ending of the lease, and the cases recognize that this is a statutorily permitted breach for which there is no damage remedy, beyond the s. 38 CTA and s. 136 BIA preferred claim.

[77] The application of *Highway Properties* was argued and rejected in the Alberta case *Principal Plaza Leaseholds Ltd. v. Principal Group Ltd. (Trustee of)* (1996), 9 W.W.R. 539 (Alta. Q.B.). In that case, the trustee of a bankrupt tenant disallowed the landlord’s claim for damages for the unexpired portion of the leases, taking the position that on disclaimer, the entire balance of the unsecured claim was extinguished. The landlord argued that *Re Mussens* and *Re Vrablik* were wrongly decided because they concluded that a disclaimer has the same effect as

a surrender, when in fact a disclaimer is a form of repudiation by the trustee without the landlord's consent. The landlord argued that on disclaimer, the landlord has the same rights that it would have on repudiation in a non-bankruptcy situation under *Highway Properties*. Cairns J. rejected this argument, stating that the overwhelming weight of authority was that the combined effect of the federal and provincial legislation is that "the claim of the landlord respecting the unexpired portion of the leases has been extinguished by the disclaimer of the leases": at p. 596.

(iii) The *Highway Properties* remedies are for repudiation, not disclaimer

[78] *Highway Properties* dealt with the remedies available to a landlord after the abandonment of the leased premises by the tenant. The tenant was not bankrupt and the provisions of the BIA and CTA were not at issue. Instead, the case addressed the landlord's remedies, outside of bankruptcy or insolvency, following a tenant's repudiation or fundamental breach.

[79] The distinction between repudiation before bankruptcy and disclaimer after bankruptcy was central to the facts in *Re TNG Acquisition Inc.*, 2011 ONCA 535, 107 O.R. (3d) 304. In that case, a trustee in bankruptcy disallowed a claim for prospective damages[11] by a landlord after the tenant, which had been in CCAA

[11] The trustee allowed the landlord's preferred claim for three months' accelerated rent limited to the value of assets on the premises as well as an unsecured claim for a portion of the arrears, operating costs and the cost of repairs. At issue was the landlord's claim for prospective losses.

proceedings, made an assignment in bankruptcy and the trustee had purported to disclaim the lease. The issue was whether the Chief Restructuring Officer (the "CRO") had already repudiated the lease on behalf of the tenant before the restructuring efforts failed and the tenant declared bankruptcy. If so, the landlord could claim its prospective damages as an unsecured creditor in the tenant's bankruptcy.[12]

[80] The Initial Order in the CCAA proceedings gave the tenant the right to "vacate, abandon or quit any leased premises and/or terminate or repudiate any lease … without prior notice … in writing … on such terms as may be agreed upon between the Applicant and such landlord or, failing such agreement, to deal with the consequences thereof in the Plan". The CRO exercised that right, sending a repudiation letter to the landlord. The landlord never acknowledged, accepted, signed or returned the repudiation letter before the restructuring failed and the bankruptcy occurred. The landlord submitted a Proof of Claim that included its "unrecoverable expenses" during the entire term of the lease. The trustee issued a disclaimer of the lease the following month. The landlord argued that the repudiation was complete when the trustee received the repudiation letter, and that the lease had already been forfeited when the trustee issued its disclaimer. This

[12] The events in this case preceded amendments to the CCAA (S.C. 2005, c. 47, s. 131) that came into force in 2009 permitting the disclaimer of agreements, including leases: see CCAA, s. 32.

argument was rejected at first instance, and the appeal from the disallowance was dismissed.

[81] In the landlord's further appeal to this court, Gillese J.A. noted that the effect of the trustee's disclaimer of the lease was to bring the lease to an end and to terminate all rights and obligations for the payment of rent: "Thus, if the trustee disclaims the lease, the landlord has no claim for rent for the remainder of the lease": at para. 14. She went on to discuss the effect of the repudiation letter. Citing *Highway Properties*, Gillese J.A. explained that repudiation does not in and of itself bring a lease to an end. Rather, "[i]t confers on the innocent party a right of election to, among other things, treat the lease as at an end, thereby relieving the parties of further performance, though not relieving the repudiating party from its liabilities for breach": at para. 34. In the absence of any election, the landlord/tenant relationship remained intact, and the lease, which had not been brought to an end in the CCAA proceedings, was therefore susceptible to statutory disclaimer by the trustee following the commencement of bankruptcy: at paras. 38, 40.

[82] It was essential in *Re TNG Acquisition* to determine whether the landlord had already accepted the CRO's repudiation of the lease at the time of the bankruptcy because this determined the remedies available to the landlord. If the repudiation had been accepted, the various options under *Highway Properties* would have been available to it, including an unsecured claim for its losses over

the unexpired term of the lease. Unless this had already occurred, the effect of the disclaimer was to preclude any such claim.

[83] In his text, *Canadian Bankruptcy and Insolvency Law for Commercial Tenancies*, David Bish observes that, while in practice, particularly outside of insolvency law, the terms “disclaim” and “repudiate” are used without distinction,[13] there are fundamental differences: “[F]or example, as a matter of common law, a landlord has no claim for damages following a disclaimer (i.e., but for the statutory reservation of such claim), whereas a landlord does have a claim for damages following repudiation”: at p. 225n.

[84] David Bish explains why disclaimer should not be viewed as a type of repudiation, at pp. 235-36:

> It may be argued that disclaimer ought to be viewed as a type of repudiation, or equivalent to a repudiation. In some respects, they achieve similar outcomes and share similar characteristics, including a fundamental refusal by a tenant to perform a lease. However, the better view is that there is an important distinction between the two concepts and neither the acts nor the consequences that flow from the acts are synonymous. Disclaimer is appealing because of its simplicity in insolvent circumstances and in sidestepping unnecessary legal complications that arise in cases of repudiation. In this respect, disclaimer is more akin to a unilateral and irrevocable act of the tenant (one that dispenses with

[13] As discussed, even in the insolvency context, “repudiate” and “disclaimer” are at times used to mean the same thing. The proposal provisions under the BIA authorized the “repudiation” of leases, until “repudiation” was replaced by “disclaimer” in 1997. In that context, the statutory “repudiation” that was authorized was the same as a “disclaimer”.

> complications such as the doctrines of waiver, notice, elections and the like), with established consequences for tenant and landlord alike. A disclaimer, unlike a repudiation, does not "put the ball in the landlord's court", so to speak; it avoids the dance between landlord and tenant that ensues where a repudiation occurs.

[85] David Bish further observes that the argument that the panoply of *Highway Properties* options should be available on disclaimer makes little sense in the insolvency scenario where it is clear that certain of those options are unworkable and where the statute provides a specific right to compensation. The landlord should not be able to elect a remedy that would negate or undermine the statutory right to disclaim: at pp. 234-35.

(iv) Conclusion on the Landlord's *Highway Properties* argument

[86] The Landlord asserts that Curriculum's bankruptcy and the disclaimer were each events of default under s. 16.1 of the Lease, triggering the rights and remedies provided thereunder. The Landlord's rights and remedies in this case, however, are determined by statute and not by the terms of the Lease. The remedies provided under the Lease for default – even those specifically applicable in bankruptcy or upon disclaimer – simply were not available once the Lease was disclaimed.

[87] On bankruptcy, the Lease vested in the Trustee and was subject to the various rights and remedies prescribed by the legislation. As in *Re TNG Acquisition*

there was no termination of the Lease that preceded the bankruptcy, and the Landlord's claim for damages for the loss of the Lease is precluded.

[88] It was suggested that the Landlord's claim for tenant inducements might be considered an existing or accrued claim because the Landlord seeks to recover money it has already spent (in the nature of a loan to the Tenant) and not damages for the loss of the Lease. There is no merit to this argument. The Landlord's claim is not for the value of the tenant inducements accrued up to the time of bankruptcy. The Landlord has already recovered such amounts in the rental payments it received. The claim is for the value of tenant inducements calculated for the remaining term of the Lease. The entitlement to recoup an amount for tenant inducements arises under the Lease and only "if [the] Lease is terminated due to the default of Tenant, or if it is disclaimed, repudiated or terminated in any insolvency proceedings". It is a remedy for default, including bankruptcy or disclaimer. In other words, the Landlord had no right to recover such amounts prior to the bankruptcy, when the Lease was immediately vested in the Trustee.

[89] To reiterate, the Trustee's disclaimer brought to an end the rights and remedies of the Landlord against Curriculum with respect to the unexpired term of the Lease, apart from the three months' accelerated rent specifically provided for under the CTA and BIA. The Landlord's unsecured claim, however it is characterized, is precluded because the disclaimer brings to an end both the Tenant's ability to insist on performance of the Lease by the Landlord and the

Landlord's ability to claim in the Tenant's bankruptcy in respect of any of its remedies. The Lease ended by disclaimer without the Landlord having terminated it or invoked its remedies under the Lease upon the occurrence of events under s. 16.1.

[90] The statutory claim is provided in place or in lieu of any ongoing rights a landlord might have against the tenant under its lease. In Ontario, the landlord has a right to claim for three months' accelerated rent. While the right can only be exercised if the lease provides for it, the right is one prescribed by statute and does not assume the continued existence or enforceability of the lease.

(d) The harmonization argument

[91] The Landlord's final argument on this issue is that the disclaimer provisions should be interpreted to permit it to assert a claim for damages for the unpaid tenant inducements because claims for damages are permitted under the parallel BIA proposal provisions and the CCAA disclaimer provision. The Landlord relies on the Supreme Court decision in *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379 for its "harmonization argument". The Landlord quotes para. 24 of that decision, which states the following:

> With parallel *CCAA* and *BIA* restructuring schemes now an accepted feature of the insolvency law landscape, the contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the two statutory schemes to the extent possible and encouraging reorganization over liquidation.

[92] Nothing in *Century Services* assists the Landlord in the present appeal. In that case, the issue was whether GST collected by a debtor but not yet remitted was subject to a statutory deemed trust under the *Excise Tax Act*, R.S.C. 1985, c. E-15 (the "ETA") in favour of the Crown, and whether the deemed trust would prevail when a CCAA stay was lifted to permit the debtor to enter bankruptcy. The debtor had attempted reorganization under the CCAA, and the subject funds were held in the monitor's trust account until it could be determined whether the reorganization would be successful. The ETA provided that the deemed trust operated despite any other enactment of Canada, except the BIA. Under the BIA, the Crown priority was lost. As a preliminary issue, the court confronted the apparent inconsistency between two federal statutes: the ETA which only expressly recognized the BIA loss of priority and the CCAA, which was enacted before the ETA and provided that "notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be [so] regarded": s. 18.3(1).

[93] Deschamps J., writing for the majority, resolved the statutory interpretation issue by concluding that the Crown's deemed trust was lost under the CCAA in the same way that it was lost under the BIA. She refused to accept that the ETA trumped the provision of the CCAA purporting to nullify most deemed statutory trusts. At para. 47, she noted that "a strange asymmetry would arise if the interpretation giving the *ETA* priority over the *CCAA* urged by the Crown is adopted

here: the Crown would retain priority over GST claims during *CCAA* proceedings but not in bankruptcy". Although the effect was to "harmonize" the two regimes in their treatment of the Crown deemed trust, in fact, this was simply a question of statutory interpretation. Deschamps J. gave effect to the provisions of the CCAA and the BIA which treated Crown GST claims the same way.

[94] Later in her reasons, Deschamps J. used the term "harmonization" to describe something else: the ability of the CCAA judge to partially lift the CCAA stay to allow the debtor's entry into bankruptcy, without requiring the term sought by the Crown – the payment of the claimed deemed trust for GST. She recognized that the CCAA judge's order fostered a "harmonious transition between reorganization and liquidation" and that the court had discretion under the CCAA to "construct a bridge to liquidation under the BIA": at paras. 77, 80.

[95] The Landlord's "harmonization" argument, advocating for the identical treatment of the disclaimer provisions, has no merit where Landlord claims are expressly treated differently in a BIA proposal, under the CCAA and in a bankruptcy.

[96] In a proposal under the BIA, s. 65.2 provides for a commercial tenant to disclaim or resiliate[14] a lease, subject to the landlord's objection and the court's

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[14] "Resiliate" is a term used under Quebec's civil law. The discussion in this paragraph leaves out references to resiliation, as only disclaimer is relevant in Ontario.

determination whether the insolvent person would be able to make a viable proposal without the disclaimer or resiliation. Section 65.2 provides that the landlord has no claim for accelerated rent even if the lease provides for it. The landlord has an election as to the calculation of its claim: it may claim its actual losses or an amount prescribed by a formula. No provision is made for priority of the landlord's claim. The disclaimer provisions also contemplate what happens where the proposal fails and the tenant becomes bankrupt, and also the reverse – where a tenant is bankrupt and then makes a proposal.

[97] Unlike the BIA proposal provisions that deal specifically with commercial leases, the CCAA disclaimer provision, s. 32, applies to the disclaimer of all agreements, including leases. Again, the disclaimer is subject to objection of the other party and court order. Subsection 32(7) provides that, where an agreement is disclaimed or resiliated, a party who suffers a loss in relation to the disclaimer is considered to have a provable claim.

[98] The fact that the BIA proposal provisions and the CCAA disclaimer provision specifically provide for a landlord's claims for damages following "disclaimer" simply indicates that Parliament intentionally departed from the bankruptcy model for landlord claims in the context of a restructuring.

[99] In sum, the fact that the three insolvency regimes all permit disclaimer but provide for different remedies represents a policy choice by Parliament. In such

circumstances, there is no scope for applying the “harmonization” principle, or reading the different provisions as providing for the same remedy. Such an interpretation would render the legislator’s deliberate policy choice irrelevant.

(2) Is the Landlord entitled to assert the balance of its claim for three months’ accelerated rent as an unsecured creditor in Curriculum’s bankruptcy?

[100] The second issue on appeal is governed by s. 136(3) of the BIA. Subsection 136(3) provides that “[a] creditor whose rights are restricted by this section is entitled to rank as an unsecured creditor for any balance of claim due him.”

[101] The Landlord was entitled to a preferred claim for three months’ accelerated rent. However, the priority of its preferred claim was subject to higher ranking priorities and, under s. 136(1)(f), was limited to the realization from the property on the leased premises. As noted above, the Trustee realized only $24,571 from the sale of the property on the premises leased by Curriculum. In consequence, the Trustee allowed the Landlord’s preferred claim for $24,571, but disallowed the balance.

[102] The Landlord is entitled to rank as an unsecured creditor for the unpaid balance of its preferred claim. This is the plain effect of s. 136(3) of the BIA. See also *Re Gingras Automobile Ltée.*, [1962] S.C.R. 676, at p. 680, where Abbott J., writing for the court, held that the combined effect of the relevant provisions under the *Bankruptcy Act*, R.S.C. 1952, c. 14 is that a landlord is only entitled to rank as

an unsecured creditor for any balance to which it may be entitled under provincial law. Under s. 38 of the CTA, a landlord is entitled to a preferred claim for three months' accelerated rent.

[103] The Trustee ought to have permitted the Landlord to claim the balance of its preferred claim for three months' accelerated rent ($50,289.28) as an unsecured creditor.

VII. DISPOSITION

[104] For these reasons, I would allow the appeal, but only to the extent of permitting the Landlord to claim the balance of its preferred claim for three months' accelerated rent as an unsecured creditor in Curriculum's bankruptcy in the amount of $50,289.28. The Trustee did not seek costs and given the divided success, I would not award costs of the appeal.

Released: April 27, 2020 ("A.H.")

"K. van Rensburg J.A."
"I agree. Alexandra Hoy A.C.J.O."
"I agree. L.B. Roberts J.A."